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Nos. 86-71 & 86-97

IN THE

Supreme Court of the United States

October Term, 1986

CTS CORPORATION,

Appellant,

v.

DYNAMICS CORPORATION OF AMERICA,

Appellee.

STATE OF INDIANA,

Intervenor-Appellant,

v.

DYNAMICS CORPORATION OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF STATE OF MINNESOTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Federal:

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INTEREST OF AMICUS CURIAE

Amicus Curiae State of Minnesota, through its Attorney General Hubert H. Humphrey, III (hereinafter "Minnesota"), respectfully submits this brief in support of the appellants. Resolution of the issues involved in this appeal will have a profound impact on Minnesota for two principal reasons.

First, this case raises a significant question regarding a state's authority to regulate the internal affairs of domestic corporations. The states' historical and longstanding authority to enact business corporation laws, without regard to the residency of the corporation's shareholders, has been severely undermined by the decision now under review by the Court. Consequently, Minnesota and its body of corporate laws,[1] which apply to corporations by reason of their incorporation in Minnesota without shareholder residency requirements, can be tremendously affected by the decision in this case.

Second, Minnesota has promulgated its own Control Share Acquisition Act (hereinafter "MCSAA").[2] It was enacted by the Minnesota Legislature in 1984 as part of an extensive modification of Minnesota's corporate takeover statutes, with an express purpose of conforming Minnesota law to this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).[3] The 1984 Minnesota corporate takeover legislation is comprised of two different parts: (a) a major revision of Minn. Stat. ch. 80B ("Chapter 80B"), the state securities law which regulates the registration of tender offers, and (b) the MCSAA, which consists of amendments to Minn. Stat. ch. 302A, the Minnesota Business Corporation Act, and requires shareholder approval of "control share acquisitions," includ-

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[1] Minn. Stat. ch. 302A (1984), as amended.

[2] Minn. Stat. § 302A.671 (Supp. 1985) as amended by Act of March 24, 1986, ch. 431, §§ 2 and 21, 1986 Minn. Laws 703, 706; the proxy provision relating thereto, Minn. Stat. § 302A.449, subd. 7 (Supp. 1985) as amended by Act of March 24, 1986, ch. 431, § 1, 1986 Minn. Laws 703; and the relevant definitional provisions, Minn. Stat. § 302A.011, subds. 37-41 (1984 & Supp. 1985). These statutory provisions are contained in the Appendix to this brief.

[3] Act of April 25, 1984, ch. 488, § 1, subd. 2(4), 1984 Minn. Laws 471.

ing those effected through tender offers.[4] The MCSAA was amended in both the 1985 and 1986 Minnesota legislative sessions.[5]

In November, 1984, the Eighth Circuit Court of Appeals concluded that Chapter 80B is constitutional. *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984). However, just recently, the Minnesota United States District Court determined that the MCSAA was unconstitutional as violating the Commerce and Supremacy Clauses of the United States Constitution, and that decision is now on appeal to the Eighth Circuit Court of Appeals. *Gelco Corp. v. Coniston Partners*, Civ. No. 3-86-847 (D. Minn. filed Nov. 7 and 10, 1986), *appeal docketed*, No. 86-5418 (8th Cir. filed Nov. 10, 1986).[6]

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[4] Act of April 25, 1984, ch. 488, 1984 Minn. Laws 470.

[5] Act of June 24, 1985, 1st Spec. Sess. ch. 5, 1985 Minn. Laws 1630, and Act of March 24, 1986, ch. 431, §§ 1, 2 and 21, 1986 Minn. Laws 703, 706.

[6] The constitutionality of the MCSAA has been the subject of two prior cases. In *Edudata Corp. v. Scientific Computers, Inc.*, 599 Supp. 1084 (D. Minn.), *appeal dismissed*, 746 F.2d 429, 430 (8th Cir. 1984), the court denied an acquiring person's motion for a temporary restraining order with respect to enforcement of the Minnesota legislation. 599 F. Supp. at 1086, 1088. Thereafter, the case was settled by the offering and target companies and thus no final decision was rendered by the court. A further challenge in *APL Limited Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216 (D. Minn. 1985), *vacated*, Civil No. 4-85-932 (Dec. 18, 1985), resulted in a decision that the MCSAA, as amended by the 1985 Minnesota Legislature, violated the Commerce Clause of the United States Constitution. *Id.* at 1220-25. This decision was appealed to the Eighth Circuit Court of Appeals, which heard the appeal on an expedited basis but ultimately was forced to dismiss the appeal as moot when the offeror and target company settled. Order, Nos. 85-5285, 85-5286 (8th Cir., Jan. 7, 1986). However, prior to dismissing the appeal, the Eighth Circuit directed the district court to vacate its decision and refused to actually dismiss the appeal or dissolve the stays pending appeal until it received the district court vacation order. Order, Nos. 85-5285, 85-5286 (8th Cir., Nov. 26, 1985).

The MCSAA is substantially similar to, but in some material respects different from, the Indiana Control Share Acquisition Act (hereinafter "ICSAA") under review in this case. The most significant difference between the two laws is that the shareholder vote under the MCSAA must be completed within twenty (20) business days of the target company's receipt of the required information,[7] which coincides precisely with the minimum offering period under the Williams Act,[8] whereas the corresponding provision under the ICSAA is fifty (50) calendar days.[9] Although some differences exist between the MCSAA and ICSAA, resolution of the instant appeal will likely impact the constitutionality of the MCSAA.

For the reasons expressed herein, Minnesota has a distinct, concrete and substantial interest in this appeal.

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[7] Act of March 24, 1986, ch. 431, § 2, 1986 Minn. Laws 703.

[8] 17 C.F.R. § 240.14e-1 (1986).

[9] Ind. Code Ann. § 23-1-42-7 (Burns Cum. Supp. 1986). Other differences between the Indiana and Minnesota laws include: (1) the ICSAA requires shareholder approval to determine whether the acquiring person may have voting rights, Ind. Code Ann. § 23-1-42-9 (Burns Cum. Supp. 1986), and the MCSAA provides for shareholder approval prior to consummation of the control share acquisition, Minn. Stat. § 302A.671, subd. 4 (Supp. 1985); (2) shareholder approval under the ICSAA requires a majority of "disinterested" shareholders, Ind. Code Ann. § 23-1-42-9 (Burns Cum. Supp. 1986) while the MCSAA provides for the majority vote of all shareholders, Minn. Stat. § 302A.671, subd. 4(a)(1) (Supp. 1985); and (3) the ICSAA requires the acquiring person to pay the expenses of the shareholder vote, Ind. Code Ann. § 23-1-42-7 (Burns Cum. Supp. 1986), whereas there is no such provision in the MCSAA.

SUMMARY OF ARGUMENT

The court of appeals decision is inconsistent with well-recognized principles relating to the states' authority to enact corporate laws. In accordance with the states' power to adopt business corporation statutes, control share acquisition laws, like the ICSAA and MCSAA, are valid and constitutional enactments. They neither violate the Commerce Clause nor the Supremacy Clause of the United States Constitution.

As to the Commerce Clause assertions, control share acquisition legislation does not directly burden interstate commerce because these business corporation statutes apply only when the target company is incorporated under the law of the regulating state. The presence of this long-accepted nexus for state corporate law regulation—state of incorporation—dispels any claims that control share acquisition legislation is *per se* invalid as a direct burden on interstate commerce.

In addition, any indirect burdens occasioned by control share acquisition laws do not clearly exceed the benefits underlying the statutes. The state benefits are substantial in extending the doctrine of shareholder democracy to a target company's shareholders, thereby allowing shareholders to decide the destiny of their company; mitigating the coercive nature of control share acquisitions; inhibiting the abusive use of takeover tactics by both target and offering companies; and enhancing a state's business environment. In relation to these benefits, the legislation imposes an insubstantial burden on interstate commerce which is identical to the burden imposed by reason of a shareholder vote on a merger proposal. Of course, mergers have historically and constitutionally been subject to the shareholder approval process.

The Supremacy Clause claims are similarly without merit. The control share acquisition statutes are consistent with the

Williams Act in that the objective of the laws, shareholder protection, is identical; time frames for the shareholder vote under the ICSAA, and certainly under control share acquisition laws like the MCSAA, do not conflict with the timing provisions of the Williams Act; and the state legislation is not contrary to the Williams Act regulation of non-tender offer control share acquisitions.

The decision of the court of appeals should be reversed.

ARGUMENT

I. CONTROL SHARE ACQUISITION LEGISLATION, LIKE THE ICSAA AND MCSAA, DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. Background.

Control share acquisition legislation, such as the ICSAA and MCSAA, was adopted pursuant to the states' longstanding and unquestioned authority to regulate the internal affairs of businesses incorporated within their respective jurisdictions. *See, e.g., Burks v. Lasker,* 441 U.S. 471, 478 (1979); *Cort v. Ash,* 422 U.S. 66, 84 (1975); *Ashley v. Ryan,* 153 U.S. 436, 446 (1894). In accordance with this historical power, state corporate laws have traditionally governed a multitude of matters affecting domestic companies and their shareholders. For example, state corporate laws have always provided various rights and protections to domestic company shareholders, whether or not the shareholders reside in that particular state,[10] including procedures for shareholders collectively to

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[10] *See, e.g.,* Minn. Stat. §§ 302A.405 (1984) (consideration for shares); 302A.413 (1984) (preemptive rights); 302A.467 (1984) (shareholder remedies); 302A.471 (1984) (rights of dissenting shareholders).

decide matters which have a major impact on the corporation.[11]

As a rational extension of existing corporate law, the control share acquisition provisions afford to shareholders a valuable right in the form of an opportunity to determine as a group whether they desire a change in control of their corporation—a change that can have a dramatic impact on the company. In providing this statutory right, the state legislatures have granted shareholders of their domestic corporations the same kind of voting control that those shareholders have traditionally exercised over other forms of transactions which can also have a substantial impact on a domestic corporation, *i.e.*, mergers, exchanges of shares, and the sale of all or substantially all of the corporation's assets. *See, e.g.*, Minn. Stat. §§ 302A.601-302A.661 (1984).

The ICSAA, and similar laws like the MCSAA, constitutes a unique, innovative and proper approach in furthering the fundamental concept of shareholder democracy. This form of legislation has been the subject of scholarly comment which concludes that the legislation is constitutional.[12]

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[11] *See, e.g.*, Minn. Stat. §§ 302A.601 - 302A.661 (1984) (shareholder approval of mergers, exchanges of shares, and the sale of all or substantially all of the company's assets).

[12] *See* Johnson, *Minnesota's Control Share Acquisition Statute and the Need for New Judicial Analysis of State Takeover Legislation*, 12 Wm. Mitchell L. Rev. 183 (1986); Profusek and Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky, or Corporation Law Concepts*, 7 Corp. L. Rev. 3, 27-41 (1984); Note, *Has Ohio Avoided the Wake of MITE? An Analysis of the Constitutionality of the Ohio Control Share Acquisition Act*, 46 Ohio State L.J. 203 (1985).

B. Control Share Acquisition Statutes, Such As The ICSAA And MCSAA, Do Not Offend The Commerce Clause Because They Neither Directly Regulate Nor Impose Clearly Excessive Burdens On Interstate Commerce.

The Commerce Clause prohibits an individual state from directly regulating or imposing clearly excessive burdens on interstate commerce. A state statute must therefore be upheld if it only indirectly impacts interstate commerce and any such burden is reasonable in relation to the local benefits derived from the state legislation. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982).; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960). The control share acquisition statutes are constitutional because their impact on interstate commerce is indirect, as well as insignificant, in comparison to the local benefits derived from the laws.

1. The Control Share Acquisition Legislation Does Not Impose A Direct Burden On Interstate Commerce.

By their very terms, control share acquisition laws, like the ICSAA and MCSAA, do not directly burden interstate commerce. The legislation only applies to control share acquisitions in a domestic corporation which has certain additional connections with the state of incorporation.[13] As a result, the

[13] The ICSAA applies to a control share acquisition in an Indiana company having its principal place of business, principal office or substantial assets in Indiana, and which has a certain level of its outstanding shares owned by Indiana residents, *e.g.*, 10 percent. Ind. Code Ann. § 23-1-42-4 (Burns Cum. Supp. 1986). The MCSAA applies to an offer to acquire shares in a Minnesota corporation which has its principal place of business, or assets greater than $1,000,000, located in Minnesota. Minn. Stat. § 302A.011, subd. 8 (Supp. 1985).

scope of these business corporation statutes is limited to companies created under the law of the regulating state and having a further nexus with that state. The control share acquisition legislation, which is part of the states' respective corporate laws, therefore does not directly impact on interstate commerce.

A contrary conclusion would effectively invalidate all state corporation laws because, as indicated above, the critical basis for such laws is that the regulating state is the state of incorporation. If this nexus, in and of itself, was insufficient to establish the indirect nature of the state regulation on interstate commerce, the longstanding authority of the states to adopt business corporation statutes would be emasculated.

Indeed, many business transactions routinely regulated by state corporate laws involve factual circumstances where the only nexus to the regulating state is that the subject company is incorporated in that state. For example, a merger proposed by a New York company with a Minnesota corporation is subject to a vote of shareholders pursuant to the Minnesota Business Corporation Act, even though *no shareholders* of the Minnesota company reside in Minnesota. *See* Minn. Stat. § 302A.613 (1984). Likewise, a voting trust between New York and Alaskan residents is unquestionably subject to Minnesota law if the stock involved is issued by a Minnesota company. *See* Minn. Stat. § 302A.453 (1984).

A multitude of similar examples can be cited where state business corporation laws properly regulate the activities of people and entities not residing in the regulating state, based upon the sole fact that the involved company is incorporated in the regulating state. Clearly, no other nexus with the regulating state is required—just the state of incorporation is sufficient to allow a state to legislate under its business corporation statutes.

The opinion in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) does not provide otherwise. The *MITE* decision involved an Illinois securities tender offer registration law, not a business corporation statute. A plurality of the Court found the legislation to constitute a direct burden on interstate commerce because it regulated beyond the permissible scope of state securities laws. The Illinois law attempted to require the registration of a tender offer for securities even though no shareholder of the target company resided in Illinois. As such, the traditional and long-accepted nexus for regulation of securities matters, *i.e.*, shareholder residency, as established in the case of *Hall v. Geiger-Jones*, 242 U.S. 539 (1917),[14] was not present in the Illinois law. Accordingly, the plurality opinion noted that if other states imposed laws like the Illinois legislation, a tender offer could be subject to the securities statutes of many different states. 457 U.S. at 642.

Contrary to the Illinois securities statute involved in *MITE*, as discussed previously, control share acquisition statutes, like the ICSAA and MCSAA, are a part of the respective state's business corporation laws and therefore contain a proper jurisdictional nexus based on the target company's state of incorporation. Further, in stark contrast to the concern expressed in the *MITE* plurality decision on direct regulation, since companies have only one state of incorporation, there is no danger that a multiplicity of state corporate laws will apply to a particular control share acquisition.

Thus, just like other state corporation law provisions, control share acquisition legislation, such as the ICSAA and MCSAA, does not directly regulate or burden interstate commerce.

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[14] The *Hall v. Geiger-Jones* decision was actually quoted and relied upon by the *MITE* direct burden plurality. 457 U.S. at 641.

2. The Control Share Acquisition Provisions Do Not Impose Clearly Excessive Burdens On Interstate Commerce.

Any indirect impact of the control share acquisition statutes on interstate commerce does not impose clearly excessive burdens in relation to the local purposes served by the state legislation. The real, concrete and substantial benefits underlying the laws far exceed any actual or speculative burden imposed by the legislation on interstate commerce.

a. The local benefits underlying the control share acquisition laws are real, concrete and substantial.

The control share acquisition legislation furthers several important local benefits. First, and most significant, in accordance with the historical concept of shareholder democracy, the state laws protect shareholders of domestic corporations by affording them the right to control the destiny of their company. Second, the legislation mitigates the coercive nature of control share acquisitions. Third, the statutes inhibit the abusive use of takeover tactics, thereby furthering shareholder rights. Fourth, the state enactments enhance the regulating state's business climate which, in turn, encourages businesses to incorporate in that state and shareholders to invest in businesses incorporated in that state.

i. Pursuant to the historical concept of shareholder democracy, the state laws protect domestic company shareholders by affording them the right to control the destiny of their company.

A transaction which results in a change in control of a corporation may have a dramatic effect upon that corporation, an effect which can certainly be as substantial as a mer-

ger or other form of extraordinary corporate transaction. The control share acquisition laws merely extend to the shareholders of the regulating state's corporations the same right already enjoyed in the merger context, *i.e.*, to vote on transactions which may materially affect their company. This right of collective shareholder approval, which is grounded in the fundamental concept of shareholder democracy, furthers important local benefits by providing shareholders of domestic corporations the opportunity to control the destiny of their company.

Just like a merger, a change in control can unquestionably impact the future course and direction of a company. Indeed, if an acquiring person effects a control share acquisition it will direct the operations of the company, even though it may have no expertise in the company's areas of operation. Furthermore, as in many takeover cases, the acquiring person could then merge with the target, drain the company of its cash, and perhaps sell off assets of the resulting company.

The target company shareholders could, of course, for a number of different reasons, have a substantial and legitimate interest in seeing that their company is not so changed. For example, regardless of the offering price, shareholders may believe that the target company's potential, if its operations continue unchanged, far exceeds that price. Therefore, shareholders may well prefer to allow the company to continue in its present method and manner of operation so that the full economic potential of the company can be realized.

Notwithstanding the foregoing, it is claimed that a state does not have a legitimate interest in extending benefits to shareholders of a domestic company if those shareholders do not reside in the regulating state. Language from *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982), is relied upon in sup-

port of this contention. Again, the *MITE* decision is inapposite.

As thoroughly discussed above, *MITE* pertained to state tender offer *securities* legislation which conferred protection on investors outside the regulating state, thereby exceeding the legitimate scope of a state securities disclosure statute. In contrast, the legislation under review in this case relates to the states' longstanding authority to regulate *domestic corporations* and thereby properly provides protection to all domestic company shareholders, no matter where they may reside. Certainly, the very purpose of domestic corporation statutes is to protect all of the company's shareholders. *E.g., Wooster Republican Printing Co. v. Channel 17, Inc.,* 533 F. Supp. 601, 617 (W.D. Mo. 1981), *aff'd,* 682 F.2d 165 (8th Cir. 1982) (state corporate law "designed primarily for the purpose of protecting the interests of shareholders of the corporation"). *See also Western Land Corp. v. Crawford-Merz Co.,* 62 F.R.D. 550, 555 (D. Minn. 1973). As far as domestic corporation laws are concerned, the shareholders' states of residency are immaterial.

A different result would seriously undermine the states' previous longstanding and unquestioned authority to regulate domestic corporations. The multitude of shareholder protection provisions contained in state corporation statutes do not distinguish between domestic company shareholders who reside in the regulating state and those who reside elsewhere. For example, all domestic company shareholders can vote on a merger proposal, irrespective of their state of residency. State corporate laws apply even where not a single shareholder of the domestic company resides in the regulating state. *See, e.g.,* Minn. Stat. § 302A.613, subd. 2 (1984) (provides that all shareholders can vote on a proposed merger, without any

stated residency requirement). Clearly, the states' regulation of domestic corporations legitimately and properly benefits all domestic company shareholders, no matter where they reside.

It is also asserted that a change in control does not impact the internal affairs of a company. The basis for this contention is found in language from the *MITE* opinion which states that "[t]ender offers contemplate transfers of stock by shareholders to a third party and *do not themselves* implicate the internal affairs of the target company." 457 U.S. at 645 (emphasis added).

Reliance on this statement from *MITE* is misplaced The state tender offer securities statute involved in *MITE* dealt with the process by which tender offers are made. The tender offer process quite clearly does not implicate the internal affairs of a company. Equally apparent, however, is the fact that control share acquisition provisions, like the ICSAA and MCSAA, do not regulate the tender offer process. Rather, these laws apply to the actual purchase of shares *following* a tender offer which would result in the acquiring person obtaining control in a domestic company. While tender offers *in and of themselves* do not affect the internal affairs of the subject corporation, a change in control clearly does implicate the internal affairs of the target company, as a typical takeover case so clearly demonstrates.

Once an acquiring person obtains control of a target company it will direct the operations of the company, even though the acquiring person may have no experience or expertise in the target's areas of operation. Further, with its acquisition of control, the acquiring person will have virtually unfettered discretion in how it changes the scope and structure of the target's business. This power, obtained upon acquisition of

control, clearly impacts on the future course and direction, let alone the very existence of the company. A corporation's internal affairs are most certainly implicated upon the consummation of a control share acquisition.

Nevertheless, it has been suggested that the internal affairs of a corporation are implicated only once the acquiring person votes its control block of stock, not at the time it consummates the control share acquisition.[15] This distinction elevates form over substance. Once control is obtained, the outcome of a shareholder vote is a foregone conclusion. In effect, the acquiring person controls the outcome of any shareholder vote and imposes its will on any minority shareholders. In the control share acquisition context, the concept of shareholder democracy can only be effectuated *before* acquisition of the controlling interest.

Finally, the contention that shareholder approval of a control share acquisition is not analogous to a shareholder vote on a merger transaction is without substance. It is apparent that for all practical purposes the transactions have an identical impact on the corporation. Without question, both mergers and control share acquisitions can have a profound effect on the future course and direction of the company.

In fact, the analogy between merger approval and control share acquisition approval is again made perfectly clear by the facts of a typical takeover case. It is common for an acquiring person to merge with the target without any mean-

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[15] Although the ICSAA does not actually require shareholder approval prior to the control share acquisition, the practical effect of the Indiana statute may be just that. *See Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 261 (7th Cir. 1986). The MCSAA, of course, expressly requires shareholder approval prior to the consummation of a control share acquisition. Minn. Stat. § 302A.671, subd. 4 (Supp. 1985).

ingful vote by the target's shareholders. The first part, or front-end, of an acquiring person's plan is to gain control of the target through its tender offer. Upon obtaining control, the acquiring person will effect the second part, or back-end, of its plan, by the merger.[16] The outcome of the shareholder vote on the merger is a foregone conclusion due to the acquiring person's prior acquisition of control. As a result, the shareholders of the target will not have an opportunity to cast a vote, or at least a meaningful vote, as to whether the target and the acquiring person should be merged. Control share acquisition provisions, like the ICSAA and MCSAA, essentially fill this gap in the law.

ii. The state laws mitigate the coercive nature of control share acquisitions.

A control share acquisition confronts each shareholder, usually on short notice, with a "take it or leave it" proposition. In such an environment, an individual shareholder's decision to sell his or her stock does not necessarily amount to a vote in favor of the terms of the control share acquisition, nor does it mean that the shareholder would not prefer to remain as a shareholder of the existing company. To the contrary, individual shareholders, not knowing the position of other shareholders with respect to the proposed control share acquisition, may well sell their stock even though they oppose a change in control, because they fear that the proposed acquisition will succeed to the detriment of their company. Lacking the opportunity to decide on a collective basis whether the proposed acquisition is desirable, individual shareholders may be coerced

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[16] *See, e.g., Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 255 (7th Cir. 1986); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 956 (Del. 1985).

into selling or tendering their shares when they would prefer to retain them.

A phenomenon commonly referred to as a "squeeze"[17] contributes further to this coercive environment. If a shareholder fails to sell his stock prior to the actual consummation of a control share acquisition, he will then be subject to a back-end merger whereby the acquiring person dictates the cash-out price. This cash-out price may be well below what the shareholder would have obtained by selling or tendering his shares prior to the consummation of the control share acquisition. Again, although a shareholder may prefer to retain his stock in the company, without knowing the position of other shareholders regarding the proposed acquisition, an individual shareholder can be squeezed into selling his or her stock.

The control share acquisition laws provide important, concrete and substantial local benefits[18] by mitigating the coer-

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[17] *See, e.g.*, *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 255 (7th Cir. 1986).

[18] The benefits underlying the state legislation are not undermined due to the fact that a self-tender, a tender offer by the issuing company, is not subject to the state law. Control share acquisition laws do not apply to self-tenders for the obvious reason that, as a matter of definition, a self-tender does not change the ownership interest of the acquiring person, the issuing company. Certainly, the issuing corporation does not have a control interest in itself, and thus a self-tender, with its necessary increase of treasury stock, does not change the issuer's "control" of itself.

Further, state corporate law has traditionally recognized the right of a domestic corporation to repurchase its own shares. *See, e.g.*, Minn. Stat. § 302A.553 (1984). The directors must, of course, in repurchasing the company's stock, comport themselves in accordance with the fiduciary obligations owed to the shareholders. *See, e.g.*, Minn. Stat. § 302A.251, subd. 1 (1984). In contrast, a tender offeror seeking control owes no fiduciary obligations to shareholders.

It is apparent that the exclusion of self-tenders from the scope of control share acquisition laws is rationally based.

cive environment incidental to control share acquisitions. These benefits are effectuated by allowing shareholders of domestic corporations to collectively approve or disapprove the proposed acquisition. This process, based on the historical concept of shareholder democracy, provides domestic company shareholders the right to act in an informed, reasoned and non-coercive environment in deciding the fate of their company.

iii. The state statutes further the interests of shareholders by inhibiting the abusive use of takeover tactics by both offerors and target companies.

Control share acquisition statutes will have a beneficial impact by inhibiting the abusive use of takeover tactics by both offering and target companies. For example, a "poison pill"[19] is adopted and implemented by target company management without a shareholder vote, but in the professed best interest of shareholders.[20] Such defensive tactics, especially when used abusively, are almost always the subject of litigation which is usually considered by the courts on an expedited basis.[21] This litigation, in turn, places a tremendous burden on the courts and incredible expenses on the litigants, which expenses adversely affect target company shareholders. As a result, the courts are forced into the middle of these complex takeover battles and, instead of the shareholders, are effectively decid-

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[19] The term "poison pill," as defined by the court of appeals, "refers to a family of shareholder rights agreements which, upon some triggering event such as the acquisition by a tender offeror of a certain percentage of the target corporation's common stock, entitle the remaining shareholders to receive additional shares of common stock (or other securities) at bargain prices." 794 F.2d at 254-55.

[20] *See, e.g., id.* at 255-56.

[21] *See, e.g., id.* at 251.

ing the eventual outcome of the takeover contest. Even more important, defensive measures of target companies oftentimes preclude the company's shareholders from considering an offer, even though a majority of the shareholders would find the offer attractive.

Control share acquisition legislation will, to a significant extent, remove the takeover battles from the courtroom and place the matter squarely before the most interested and affected parties, the shareholders. Certainly, target company management cannot as easily claim that "poison pills," or other defensive measures, are in the best interest of shareholders when a mechanism is readily available to enable the company's shareholders to vote on a proposed control share acquisition and thereby directly resolve the question for themselves. The mere presence of control share acquisition laws can therefore discourage the abusive use of defensive tactics by management.

The state legislation can actually be used affirmatively by offerors to bring the question of a control share acquisition directly to the shareholders, thereby bypassing the implementation of potentially abusive takeover tactics by target company management. If an offeror so chooses, it can invoke the law simply by filing the necessary information statement and thus force a shareholder vote on the proposed acquisition. Should the offeror prevail in the shareholder vote, it would be difficult, if not impossible, for target company management to employ defensive tactics to defeat the offer, if shareholders have already voiced their approval of the transaction.

Control share acquisition laws will similarly inhibit "greenmail," [22] a common abusive purpose of offering companies.

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[22] "Greenmail" has been defined as "[t]aking a large position in a company's stock, threatening a takeover, and then selling the shares back to the company at above-market prices. In short, it's

Payment of greenmail can economically devastate a target company and its shareholders, as well as deprive the shareholders from considering an offer they might otherwise approve.[23] Again, target company management cannot as readily agree to pay greenmail in the purported best interest of the shareholders when a process is available for the shareholders themselves to decide the propriety of the takeover transaction. As a consequence, an offering company cannot as easily extract greenmail from a target company, and therefore, the incidence of greenmail will presumably decrease dramatically due to the existence of control share acquisition legislation.

It is apparent, then, that the control share acquisition statutes provide real and substantial benefits by inhibiting abusive takeover practices, thereby enhancing the rights of shareholders.

iv. The legislation enhances a state's business climate.

The control share acquisition laws enhance a state's business climate, and, as a result, encourage investment in the regulating state and its domestic corporations. It is not disputed that the corporate takeovers can in a very short period dramatically alter a target company's business operations, whether it be, for example, the extortion of greenmail,[24] or merely the draining of the target's assets. The subject state

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a form of legal corporate blackmail." Reiser, *Corporate Takeovers: A Glossary of Terms & Tactics,* 89 Case & Com. 35, 44 (1984) (footnote omitted).

[23] *See, e.g.,* Note, *Exclusionary Tender Offers: A Reasonably Formulated Takeover Defense or A Discriminatory Attempt To Retain Control?,* 20 Ga. L. Rev. 627, 652-56 (1986); Note, *Greenmail: Targeted Stock Repurchases and the Management—Entrenchment Hypothesis,* 98 Harv. L. Rev. 1045, 1064-65 (1985).

[24] *See supra* note 22.

statutes afford to shareholders of domestic corporations the right to vote on control share acquisitions and thereby have some say in the future course and direction of their company. This ensures an orderly transition of control and power in the company pursuant to an informed and reasoned process wherein the shareholders have the ultimate voice in determining whether a change of control is best for their company.

It is important to note that promotion of a state's business climate is not premised upon precluding corporate raiders from moving business operations outside the regulating state. Instead, as indicated above, control share acquisition legislation promotes a state's business environment by providing an opportunity to shareholders of that state's corporations at least to participate in deciding the fate of their company. Due to the lightning-quick manner in which even longstanding shareholders, including the "founding fathers," of a corporation can be affected by a control share acquisition, extension of the shareholder democracy principle to these transactions is certainly attractive to businesses and their investors.

b. The burden on interstate commerce is insignificant in relation to the local benefits derived from control share acquisition legislation.

The burden imposed on interstate commerce by control share acquisition statutes is a limited restriction on an acquiring person in purchasing a particular amount of stock in a domestic company. The laws apply only to control share acquisitions, and even then they do not preclude such purchases. Rather, the legislation requires shareholder approval of control share acquisitions. Significantly, the control share acquisition provisions do not restrict other persons from buying or selling shares in the corporation.

Certainly, the burden on interstate commerce is no different than the one imposed by operation of corporate merger statutes. For example, a cash-out merger is clearly and constitutionally subject to shareholder approval.[25] Identical to the control share acquisition statutes, if a cash-out merger is collectively disapproved by shareholders, an individual shareholder is unable to sell his or her stock to the merging company in accordance with the proposed merger. This would be the case even if the merging company were a foreign corporation and no shareholders of the domestic company resided in the regulating state. Thus, the impact on interstate commerce is the same under a proposed control share acquisition and a cash-out merger.

Just as significant is that any burden on interstate commerce occasioned by the legislation is no greater than that imposed by state laws which require regulatory approval of control share acquisitions. Such laws can completely foreclose a transaction in interstate commerce. Yet, these state laws have been declared constitutional even though they impact on the ability of persons residing outside the regulating state to purchase stock in interstate commerce. *See, e.g., Baltimore Gas & Elec. Co. v. Heintz,* 760 F.2d 1408, 1421, 1427 (4th Cir.), *cert. denied,* 106 S. Ct. 141 (1985).

Furthermore, in the event a control share acquisition does not obtain shareholder approval, it is speculative whether the loss of such a transaction is actually a burden on interstate commerce. The recent rash of corporate takeovers shows that the economy and society in general are not always well served by such transactions. For example, greenmail, which is often incidental to and a purpose of a threatened control share acquisition, detrimentally affects both a target company and

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[25] *See, e.g.,* Minn. Stat. § 302A.613, subd. 2 (1984); *Ashley v. Ryan,* 153 U.S. 436, 446 (1894).

its shareholders and furthers no worthy interest.[26] Discouraging these types of transactions serves to benefit, not burden, interstate commerce.

Presumably, if an acquiring person makes a reasonable proposal to the target company's shareholders, the proposed acquisition will be approved. Only those transactions that detrimentally impact on the company and its shareholders will fail to receive shareholder approval.

In measuring the alleged burden on interstate commerce, it must be recognized that a shareholder, no matter where he or she resides, purchases stock in a company subject to the laws of the state of incorporation. *See Broderick v. Rosner*, 294 U.S. 629, 644 (1935); *First National Bank v. Gustin-Minerva C.M. Company*, 42 Minn. 327, 328, 44 N.W. 198, 198-99 (1890). The domestic corporation laws effectively form a contract or charter between the corporation, its shareholders and the regulating state. *E.g., Aiple v. Twin City Barge & Towing Co.*, 274 Minn. 38, 46, 143 N.W.2d 374, 379 (1966); *Seitz v. Michel*, 148 Minn. 80, 84, 181 N.W. 102, 104 (1921). *See generally* 7A Fletcher, *Cyclopedia of Corporations*, § 3657 (Supp. 1986). Accordingly, as a matter of law, a shareholder purchases stock knowing full well that the incorporating state's corporate laws may impose restrictions on the accumulation of such stock.

Upon balancing the burden imposed by and benefits derived from the control share acquisition statutes, it is apparent that the legislation is constitutional. Like almost any state law, such as a corporate merger statute, the legislation under review in this case imposes some burden on interstate commerce. However, this burden is indirect and insignificant in relation to the benefits derived from the law. As a consequence, the

[26] *See supra* note 23.

burden imposed on interstate commerce by the law is *not clearly excessive* in comparison to the local benefits underlying the legislation.

II. CONTROL SHARE ACQUISITION LEGISLATION, SUCH AS THE ICSAA AND MCSAA, DOES NOT VIOLATE THE SUPREMACY CLAUSE.

It is undisputed that Congress has never expressed any intent to preempt state corporation laws, in the Williams Act or elsewhere, nor has it indicated any intent to occupy the entire field of such regulation. *See, e.g., Cardiff Acquisitions, Inc. v. Hatch,* 751 F.2d 906, 913 (8th Cir. 1984); *Agency Rent-A-Car, Inc. v. Connolly,* 686 F.2d 1029, 1036-37 (1st Cir. 1982). Because it is not physically impossible to comply with both the Williams Act and a control share acquisition law, the issue before the Court is whether state law so conflicts with the federal law that the state statute *substantially* frustrates the objectives of federal legislation. If not, the state law must be upheld. *See, e.g., Edgar v. MITE Corp.,* 457 U.S. 624, 632 (1982); *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963).

An examination of the state and federal laws demonstrates that the control share acquisition statutes do not frustrate, even in an insubstantial way, the purposes underlying the Williams Act. Indeed, the express objective and the timetable of the ICSAA, and certainly statutes like the MCSAA, are consistent with federal law. Moreover, the applicability of control share acquisition statutes to non-tender offer control share acquisitions does not conflict with the Williams Act.

A. The Objective Of Control Share Acquisition Laws, Such As The ICSAA And MCSAA, Is Consistent With, And Therefore Does Not Substantially Frustrate, The Purposes Of The Williams Act.

It is unquestioned that the principal and overriding objective of Congress in adopting the Williams Act was the protection of investors. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 22-24 (1977); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1129 (8th Cir. 1982); *Missouri Portland Cement Co. v. H.K. Porter Company, Inc.*, 535 F.2d 388, 393 (8th Cir. 1976). Similarly, control share acquisition legislation has been enacted to protect shareholders.[27] To accomplish this purpose, the laws impose the requirement that the shareholders vote on and approve the proposed acquisition.[28] As discussed previously, this requirement enhances the individual and collective rights of shareholders by allowing them, in accordance with the fundamental principle of shareholder democracy, to control the destiny of their company, by mitigating the coercive nature of control share acquisitions and by inhibiting the abusive use of takeover tactics. See *supra* at 11-20.

Not only do these state laws further the investor protection objective of the Williams Act, but they also do not disrupt the balance created by the Williams Act between the acquiring person and target company management.[29] Indeed, in promot-

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[27] For example, the Minnesota Legislature specifically stated that the MCSAA was intended to "provide to shareholders both necessary information and the opportunity to thus cast fully informed votes on any takeover transactions." Act of April 25, 1984, ch. 488, § 1, subd. 2(2), 1984 Minn. Laws 471.

[28] Ind. Code Ann. §§ 23-1-42-6 and -7 (Burns Cum. Supp. 1986), and Minn. Stat. § 302A.671, subds. 2 and 4 (Supp. 1985), as amended.

[29] *See Schreiber v. Burlington Northern, Inc.*, 105 S. Ct. 2458, 2463 (1985).

ing shareholders' interests by requiring collective shareholder approval of a control share acquisition, the legislation operates in an evenhanded manner. Both the offeror and management are subject to the same federal proxy rules and the same time constraints in presenting their respective positions to the shareholders. Consequently, the statutes favor neither management nor the offeror in presenting the proposed control share acquisition to a vote of the shareholders.

B. The Timetables Set Forth In Control Share Acquisition Legislation Like The ICSAA, And Particularly The MCSAA, Do Not Substantially Frustrate The Purposes Of The Williams Act.

The ICSAA is tailored to avoid any conflict with the procedural requirements of the Williams Act in the event a tender offer is made. The disclosure and voting requirements of the ICSAA are structured so they will be completed no later than 50 days after the information statement relating to the proposed acquisition is delivered to the target corporation.[30] As a result, the requirements of the ICSAA will be satisfied prior to the time that shareholders can, pursuant to the Williams Act, withdraw any tendered shares.[31]

Control share acquisition statutes like the MCSAA present an even clearer case of no conflict between the state and federal laws. Under the MCSAA, the required shareholder vote must be completed within twenty (20) business days of the

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[30] Ind. Code Ann. § 23-1-42-7 (Burns Cum. Supp. 1986).

[31] Effectively, shareholders may withdraw any tendered shares for up to 15 business days after the tender offer is commenced or after 60 calendar days following commencement. Thus, under the Williams Act, the shareholder is unable to withdraw any tendered shares between the 16th business day and the 60th calendar day after the offer. 15 U.S.C.A. § 78n(d)(5) (1981) and 17 C.F.R. § 240.14d-7(a)(1) (1986).

target company's receipt of the information statement. Act of March 24, 1986, ch. 431, § 2, 1986 Minn. Laws 703. Accordingly, the Minnesota law does not conflict with the twenty (20) business day minimum period for an offer to remain open under the Williams Act,[32] as all state mandated procedures will be completed within the twenty (20) business day period. *See Cardiff Acquisition, Inc. v. Hatch,* 751 F.2d 906 (8th Cir. 1984). Hence, there is absolutely no delay occasioned by the Minnesota law in the consummation of a tender offer under the Williams Act.

The argument that the shareholder vote *could* be extended beyond the state law time frame because of *possible* delay in counting votes, or because of *possible* vote challenges, does not present a proper reason for invalidating the state legislation. Such speculative and hypothetical contentions cannot be a basis for deciding constitutional challenges. *See, e.g., Bardini Petroleum Co. v. Superior Court,* 284 U.S. 8, 22 (1931) ("Constitutional questions are not to be dealt with abstractly."). Moreover, even assuming, *arguendo,* that the Court could speculate as to potential for delay in the vote process, there is no showing that this hypothetical delay would constitute an "unreasonable delay," as envisioned by a plurality of the Court in *Edgar v. MITE Corp.,* 457 U.S. 624, 639 (1982).

It is also suggested that a control share acquisition statute is unconstitutional because it could preclude altogether the consummation of a tender offer if the acquiring person does not prevail in the shareholder vote. However, the Williams Act establishes no substantive federal right to purchase shares pursuant to a tender offer. *See, e.g., Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1 (1977); *AMCA International Corp.*

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[32] 17 C.F.R. 240.14e-1 (1986).

v. Krause, 482 F. Supp. 929, 937 (S.D. Ohio 1979). It merely regulates the process by which an offeror must make his offer to purchase shares. The control share acquisition legislation does not interfere with this process. Rather, it simply accords to shareholders, on a collective basis, the right to approve or disapprove a change in control of their corporation—a transaction that can fundamentally alter the make-up and future of their corporation. To deprive shareholders of such an important right would be contrary to the traditionally democratic nature of corporate governance. To deny the states the power to grant such a right would be a dramatic departure from the historical role that states have played in regulating the corporations which they create.

C. The Applicability Of Control Share Acquisition Statutes To Non-Tender Offer Control Share Acquisitions Does Not Conflict With The Williams Act.

The Williams Act does not regulate non-tender offer transactions, such as open market purchases, except to the extent it requires any person who has accumulated more than five percent of a company's stock to make a Schedule 13D filing with the Securities and Exchange Commission. Section 13(d) of the Securities Exchange Act of 1934.[33] As such, the requirements of control share acquisition statutes do not conflict with the Section 13(d) disclosure provisions of the Williams Act and, for the reasons discussed above, actually further the investor protection purposes of the federal law. *See supra* at 11-20.

Nonetheless, it is suggested that the Williams Act, in a non-tender offer transaction, *implicitly* authorizes an open market

[33] 15 U.S.C.A. § 78m(d)(1) (1981). *See also* 17 C.F.R. § 240.13d-1 (1986).

or other acquisition of stock without any delay occasioned by state regulation. This argument is without merit.

Not only is it presumed that Congress did not preempt state law,[34] but there is simply no compelling indication that Congress, by its silence, intended to tacitly supersede state corporate laws. To the contrary, the Williams Act, in the non-tender offer context, only provides a disclosure mechanism relating to the accumulation of stock in a particular company. The federal law is by no means so pervasive as to preclude the states from invoking their historical authority to regulate domestic corporations.[35] *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

As discussed previously, *see supra* at 14, the Williams Act regulates a different subject matter than do control share acquisition statutes. The federal law pertains to disclosures in the securities context, whereas the state law governs control share acquisitions which could materially impact on a domestic company's internal affairs. The federal and state laws, consistent with their traditional authority to regulate in their respective areas, constitutionally co-exist.

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[34] *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 206 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

[35] This conclusion finds compelling support in *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1036-37 (1st Cir. 1982). In that case, the court convincingly rejected the argument that Congress intended to occupy the entire field of control share acquisitions in adopting the Williams Act. The court therefore upheld, against a preemption challenge, a state law which regulated all methods of acquiring stock in a target corporation, whether by open market purchase, by solicitation of particular shareholders, by tender offer, or otherwise. In so doing, the First Circuit Court of Appeals recognized that Congress has not evinced an intent in the Williams Act, implicitly or otherwise, to preempt state law. 686 F.2d at 1036-37.

CONCLUSION

Based on the foregoing, *Amicus Curiae* State of Minnesota hereby requests that the Court reverse the decision of the Seventh Circuit Court of Appeals.

Dated: December 4, 1986.

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APPENDIX

Minn. Stat. § 302A.671 (Supp. 1985), as amended by Act of March 24, 1986, ch. 431, §§ 2 and 21, 1986 Minn. Laws 703, 706 provides:

302A.671 CONTROL SHARE ACQUISITIONS.

Subdivision 1. Authorization in articles. (a) Unless otherwise expressly provided in the articles or in bylaws approved by the shareholders of an issuing public corporation, this section does not apply to a control share acquisition.*

(b) All shares acquired by an acquiring person in violation of subdivision 4 shall be denied voting rights for one year after acquisition, the shares shall be nontransferable on the books of the corporation for one year after acquisition and the corporation shall, during the one-year period, have the option to call the shares for redemption at the price at which the shares were acquired. Such a redemption shall occur on the date set in the call notice but not later than 60 days after the call notice is given.

Subd. 2. Information statement. An acquiring person shall deliver to the issuing public corporation at its principal executive office an information statement containing all of the following:

(a) the identity of the acquiring person;

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* This provision, Minn. Stat. § 302A.671, subd. 1(a), becomes effective on August 1, 1987, in accordance with Act of June 24, 1985, 1st Spec. Sess. ch. 5, § 21, 1985 Minn. Laws 1640 and Act of March 24, 1986, ch. 431, § 21, 1986 Minn. Laws 706. Minn. Stat. § 302A.671, subd. 1(a) as currently in effect is codified at Minn. Stat. § 302A.-671, subd. 1(a) (1984) and provides:

Subd. 1. Authorization in articles. (a) Unless otherwise expressly provided in the articles of an issuing public corporation, this section applies to a control share acquisition.

(b) a reference that the statement is made under this section;

(c) the number of shares of the issuing public corporation beneficially owned by the acquiring person;

(d) a specification of which of the following ranges of voting power in the election of directors would result from consummation of the control share acquisition:

(1) at least 20 percent but less than 33-1/3 percent;

(2) at least 33-1/3 percent but less than or equal to 50 percent;

(3) over 50 percent; and

(e) the terms of the proposed control share acquisition, including, but not limited to, the source of funds or other consideration and the material terms of the financial arrangements for the control share acquisition, plans or proposals of the acquiring person to liquidate the issuing public corporation, to sell all or substantially all of its assets, or merge it or exchange its shares with any other person, to change the location of its principal executive office or of a material portion of its business activities, to change materially its management or policies of employment, to alter materially its relationship with suppliers or customers or the communities in which it operates, or make any other material change in its business, corporate structure, management or personnel, and such other objective facts as would be substantially likely to affect the decision of a shareholder with respect to voting on the proposed control share acquisition.

Subd. 3. MEETING OF SHAREHOLDERS. Within five days after receipt of an information statement pursuant to subdivision 2, a special meeting of the shareholders of the issuing public corporation shall be called pursuant to section 302A.433, subdivision 1, to vote on the proposed control share acquisition. The meeting shall be held no later than 20 busi-

ness days after receipt of the information statement, unless the acquiring person agrees to a later date. The notice of the meeting shall at a minimum be accompanied by a copy of the information statement and a statement disclosing that the board of directors of the issuing public corporation recommends acceptance of, expresses no opinion and is remaining neutral toward, recommends rejection of, or is unable to take a position with respect to the proposed control share acquisition. The notice of meeting shall be given at least ten days prior to the meeting.

Subd. 4. Consummation of control share acquisition. The acquiring person may consummate the proposed control share acquisition if and only if both of the following occur:

(1) the proposed control share acquisition is approved by the affirmative vote of the holders of a majority of the voting power of all shares entitled to vote.

A class or series of shares of the corporation is entitled to vote as a class or series if any provision of the control share acquisition would, if contained in a proposed amendment to the articles, entitle the class or series to vote as a class or series; and

(2) the proposed control share acquisition is consummated within 180 days after shareholder approval.

Subd. 5. Rights of action. An acquiring person, an issuing public corporation, and shareholders of an issuing public corporation may sue at law or in equity to enforce the provisions of this section and section 302A.449, subdivision 7.

Subd. 6. Return of shares if acquisition not consummated. If the proposed control share acquisition is not consummated in accordance with this section, the acquiring person shall immediately return any and all shares held in anticipation of the

consummation to the shareholders from whom the person received the shares.

Minn. Stat. § 302A.449, subd. 7 (Supp. 1985), as amended by Act of March 24, 1986, ch. 431, § 1, 1986 Minn. Laws 703 provides:

Subd. 7. PROXY IN CONTROL SHARE ACQUISITION. Notwithstanding any contrary provision of this chapter, a proxy relating to a meeting of shareholders required under section 302A.671, subdivision 3, must be solicited separately from the offer to purchase or solicitation of an offer to sell shares of the issuing public corporation. Except for irrevocable proxies appointed in the regular course of business and not in connection with a control share acquisition, all proxies appointed for or in connection with the shareholder authorization of a control share acquisition pursuant to section 302A.671 shall be at all times terminable at will prior to the obtaining of the shareholder authorization, whether or not the proxy is coupled with an interest. Without affecting any vote previously taken, the proxy may be terminated in any manner permitted by subdivision 3, or by giving oral notice of the termination in the open meeting of shareholders held pursuant to section 302A.671, subdivision 3. The presence at a meeting of the person appointing a proxy does not revoke the appointment.

Minn. Stat. § 302A.011, subds. 37-41 (1984 & Supp. 1985) (Definitions), provides:

Subd. 37. Acquiring person. "Acquiring person" means a person that is proposing to make a control share acquisition. When two or more persons act as a partnership, limited partnership, syndicate, or other group for purposes of ac-

quiring, owning or voting securities of an issuing public corporation, the syndicate or group is a "person."

"Acquiring person" does not include a licensed broker/dealer or licensed underwriter who (1) purchases shares of an issuing public corporation solely for purposes of resale to the public; and (2) is not acting in concert with an acquiring person.

Subd. 38. Control share acquisition. "Control share acquisition" means an acquisition of shares of an issuing public corporation resulting in beneficial ownership by an acquiring person of a new range of voting power specified in section 302A.671, subdivision 2, paragraph (d), but does not include any of the following:

(1) an acquisition before, or pursuant to an agreement entered into before, August 1, 1984;

(2) an acquisition by a donee pursuant to an inter vivos gift not made to avoid section 302A.671 or by a distributee as defined in section 524.1-201, clause (10);

(3) an acquisition pursuant to a security agreement not created to avoid section 302A.671;

(4) an acquisition under sections 302A.601 to 302A.661, if the issuing public corporation is a party to the transaction; or

(5) an acquisition from the issuing public corporation.

Subd. 39. Issuing public corporation. "Issuing public corporation" means a corporation with at least 50 shareholders and which has either its principal place of business located in this state or owns or controls assets located within this state that have a fair market value of at least $1,000,000.

Subd. 40. Publicly held corporation. "Publicly held corporation" means a corporation that has a class of equity securities registered pursuant to section 12 of the Securities Exchange Act of 1934, as amended through December 31, 1984.

Subd. 41. Beneficial ownership. Beneficial owner includes, but is not limited to, any person who directly or indirectly through any contract, arrangement, understanding, relationship, or otherwise has or shares the power to vote or direct the voting of a security and the power to dispose of, or direct the disposition of, the security. "Beneficial ownership" includes, but is not limited to, the right, exercisable within 60 days, to acquire securities through the exercise of options, warrants, or rights or the conversion of convertible securities, or otherwise. The securities subject to these options, warrants, rights, or conversion privileges held by a person shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by this person, but shall not be deemed to be outstanding for the purpose of computing the percentage of the class owned by any other person. A person is the beneficial owner of securities beneficially owned by any relative or spouse or relative of the spouse residing in the home of this person, any trust or estate in which this person owns ten percent or more of the total beneficial interest or serves as trustee or executor, any corporation or entity in which this person owns ten percent or more of the equity, and any affiliate or associate of this person.